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**ERIC JAMES HEIL, ESQ.**

TELECOPIER COVER SHEET

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Ramon Escure, Rico Renaissance, fax # (970) 728-5194

DATE: 4-27-04

FROM: Eric James Heil

PHONE: (970) 967-5550

RE: Comment letter on VCUP application

PAGES W/ COVER: 10

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NOTES:

## ERIC JAMES HEIL, ESQ., A.I.C.P.

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4-26-04

Max Dodson, Deputy Administrator Region VIII  
US EPA 8EPR  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

Dear Mr. Dodson,

Thank you for hosting the meeting on Wednesday, March 31<sup>st</sup>. It was a very positive meeting and the Town is encouraged by all the progress that has been realized through cooperative efforts. The willingness of EPA to involve the community and consider community based solutions to the soils contamination health risk is greatly appreciated and has already resulted in a far more cooperative, comprehensive, and long term lead contaminated soils risk abatement plan. The Board of Trustees for the Town of Rico discussed the VCUP Application further at its April 21<sup>st</sup> regular meeting in order to provide direction on comments by the Town of Rico. We also appreciated the attendance of Debra Ehlerl at the meeting. This letter provides additional comments on the joint VCUP application as well as comments on issues discussed at the meeting.

**Summary:** The Town Board endorses the Rico Soils VCUP application as well as using the process set forth in the State of Colorado's Voluntary Clean-up and Redevelopment Act. The Town Board is supportive of acting as a co-applicant for the Rico Soils VCUP application and will consider taking final action to approve the Rico Soils VCUP application as a co-applicant at its regular Town Board meeting on May 19<sup>th</sup>. The Town Board would like to ensure that the Rico Soils VCUP application includes more oversight and involvement by the EPA than is contemplated in the Voluntary Clean-Up and Redevelopment Act; however, the Town Board is not supportive of any enforcement action by EPA under CERCLA authority or other federal authority, including but not limited to any Administrative Order on Consent or Unilateral Administrative Order.

The Town of Rico has recently received a grant funding award from the Department of Local Affairs in the amount of \$15,000.00 to assist with comprehensive local efforts to pursue voluntary environmental remediation efforts as well as funding contribution commitments from Atlantic Richfield Corporation and Rico Renaissance in the combined amount of \$15,000.00. Thus, with the addition of funds from the Town Budget, the Town Board has a strong comfort level that the Town has the resources to facilitate and support a quality voluntary clean-up program that will promote the best interests of our community. Also, the Town Board approved retaining Gault Group as independent environmental consultants to review the Rico Soils VCUP application and provide additional comments. Finally, the deadline for the Town Board packet prior to the May 19<sup>th</sup> meeting is May 13<sup>th</sup>; therefore, I would like to encourage the EPA as well

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as the other parties, to provide input in advance of the Board packet deadline date so that as many issues as possible can be addressed prior to submitting the final revised Rico Soils VCUP application to the Rico Town Board.

**VCUP Application:** The Town of Rico has taken action to pass first reading of a ordinance approving the Rico Soils VCUP application with the Town of Rico as a co-applicant. The final and second reading of an Ordinance approving the Town signing as a co-applicant is scheduled for public hearing and action at the regular Town Board meeting on May 19<sup>th</sup>, 2004. Town believes that the community involvement process is critical for any action to address soils contamination, therefore, this schedule will allow sufficient time for community review of the VCUP application as well as consideration of comments from CDPHE and EPA. The Town expects further revisions to the VCUP application based on comments from CDPHE, EPA, public comments, review by a third party environmental consultant, and comments from the Town. Therefore, Town intends to reserve its final approval of the VCUP application until the May Town Board meeting to provide a reasonable time frame for additional revisions.

**Compliance with VCUP Application requirements:** We understand that the EPA and CDPHE are demonstrating flexibility in considering the Rico Soils VCUP application; however, considering Rico's situation and willingness of capable parties to conduct a voluntary clean-up, we believe the VCUP process is entirely appropriate. C.R.S. §25-16-302(1) states, "The general assembly hereby declares that the purpose of this part 3 is to provide for the protection of human health and the environment . . ." While the Voluntary Cleanup and Redevelopment Act ("Act") and the Memorandum of Agreement between the Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VIII ("MOU") both make references to facilitating redevelopment of commercial and industrial properties, neither the Act nor MOU expressly limits their purpose to non-residential properties and the stated purpose of protecting human health is central to the Rico Soils VCUP application.

**Comments by EPA:** Attachment A to the MOU states, "If CDPHE and the applicant jointly decide to seek EPA's review and approval, EPA will provide its comments as quickly as possible." Neither Attachment A nor the MOU defines to whom EPA's comments shall be provided and no guidance is provide regarding "as quickly as possible." The Town requests that comments be provided to the Town as well as CDPHE and the other co-applicants for the reasons that (1) the Town Board acts as the local board of health and (2) Town is pending co-applicant for the Rico Soils VCUP application. Written comments would be strongly preferable because they can be forwarded to the Rico Town Board for consideration.

**Status and Review of VCUP:** The Town would appreciate written correspondence to all co-applicant parties stating the status and review of the VCUP application with regarding to review deadlines, extensions, referral to EPA for comment, determination of interpretation of the MOU and Voluntary Clean-up and Redevelopment Act. We believe that such correspondence will improve the efficiency of review and implementation of the Rico Soils VCUP application.

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**Involvement of All Co-Applicants:** While ARCO has stated that it intends to finance a significant portion of the Rico Soils VCUP application as well as provide their project management expertise it is very important that the Town of Rico and Rico Renaissance be included in all information and decision making meetings. While it may not be necessary for all co-applicants to attend every meeting, all co-applicants should be notified of any meetings concerning the Rico Soils VCUP application as well as the nature of the meeting. This is very important because Rico Renaissance is seeking to provide land for a long term repository as well as intending to contribute financially to the clean-up effort and the Town of Rico is tasked with community involvement, local oversight, and facilitation of the clean-up at the local government level.

**Public Involvement:** Attachment A to the MOU contemplates a minimum amount of public involvement, which reads more as "public notification" after an approval is given rather than true public involvement. As you are aware, the Town is actively conducting a thorough public involvement process. Thus far, the Town has held two public hearings at Town Board meetings, hosted the EPA community meeting on February 11<sup>th</sup>, conducted a community meeting on March 24<sup>th</sup>, and has scheduled a public hearing for the May 19<sup>th</sup> Town Board meeting. In addition, the Town has included information concerning the lead risk issue in several Town monthly newsletters which go out to every water tap holder, sent an informational mailer to every property owner in Rico in early March, and posted soil risk information and the Rico Soils VCUP application on the Town's website. The ability to inform and involve the Rico community is a significant benefit of the Town acting as a co-applicant in the Rico Soils VCUP. As part of the Rico Soils VCUP application, the Town would welcome any suggestions to establish the best community involvement process possible. Due in part to funding from the Department of Local Affairs, it is the Town's goal to plan and implement a model community involvement process. EPA's assistance with this would be greatly appreciated, especially with regard to technical assistance to gather risk information and risk determination guidance to post on our website.

**Environmental Assessment, Soil Sampling:** At the meeting in Denver we acknowledged that the VCUP application is a two phase proposal where the second phase will be more compliant with the VCUP application requirements. Phase I of the VCUP application proposes comprehensive soils sampling and a risk assessment process. C.R.S. §25-16-304(2)(a) states, "A voluntary clean-plan shall include: (a) An environmental assessment of the real property which describes the contamination, if any, on the property and the risk the contamination currently poses to public health and the environment; . . ." Thus, the Rico Soils VCUP application is not actually complete as submitted, but sets forth a plan in Phase I to conduct a comprehensive environmental assessment of lead contamination in soils. The Town endorses this approach for the following reasons: (1) the proposed plan for soil sampling will include all improved residential properties, parks and school properties, where a direct health risk is possible, and (2) the sampling plan is more comprehensive by including town streets, vacant lots in Town, river corridor and commercial properties. The comprehensive nature of the soil sampling plan is essential for our local efforts to establish a long term plan for management of contamination soils and associated potential health risks. The importance of a long term management plan and enactment of local institutional controls cannot be understated because the Town plans to excavate all streets for the

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installation of a centralized sewer system and a majority of the Townsite is comprised of vacant lots which will be eventually excavated for development.

**Phase I Health Risk Determination:** The Town endorses the Risk Determination approach described in Section 3.0 of the Rico Soils VCUP application which states that it will utilize adopted EPA guidance. The Town requests the EPA to provide comments if there are other appropriate EPA guidance documents on lead risk determination that are not cited by the Rico Soils VCUP application.

**Long Term Management:** The Town recognizes that meaningful protection of the public health will require long term management of contaminated soils issues in the future. As such, Town plans to prepare "institutional controls" to be incorporated into the Town of Rico's Land Use Code. The Town recently received funding contribution commitments that will provide the resources for the Town to implement institutional controls. Technical assistance from EPA and CDPHE will be greatly appreciated. Town would be supportive of including provisions in the VCUP that address the need and benefit of incorporating institutional controls for long term management of contaminated soils issues. Town also recognizes the importance of determining the viability of a local contaminated soils repository and obtaining approval for such a repository. The Town intends to cooperate with Rico Renaissance and ARCO to pursue the planning and permitting for a repository as soon as possible (particularly with regard to the pending sewer excavation as well as planned individual construction). The co-applicants are planning a site investigation as soon as the snow clears from the lower Telescope mountain area north of Town, which could occur in the next two to three weeks. Town supports the Rico Soils VCUP application because it provides a practical and feasible approach for the Town's ability to implement a long term management plan. Also, with over 200 separately owned vacant parcels of land in Town, a practical long term management plan will provide an immeasurable benefit for many property owners.

**Monitoring and Completion Verification:** The Voluntary Clean-up and Redevelopment Act does not contemplate extensive monitoring during clean-up activities and states, "... verification of the completion of a clean-up under the VCUP is left to the applicant." Monitoring and verification is important for the Town. The ability of the Town to insure that we can participate in monitoring and completion verification is another significant benefit to the Town applying as a co-applicant. However, the Town believes technical assistance from EPA as well as CDPHE would be very important because the Town does not have the same level of experience in monitoring and completion verification.

We understand that the "applicant" must certify a completion report in order to receive a 'No Further Action Determination.' Therefore, Town understands that as a co-applicant, Town will have the ability to withhold certifying a completion report if Town has knowledge of non-compliance with the implementation of the Rico Soils VCUP application. Town believes that a section should be added to the Rico Soils VCUP that should define the proposed monitoring process and completion verification. Locally, Town can continue to share information with federal and state officials, including written progress reports and digital picture documentation.

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However, it would seem beneficial to plan at least a few visits by EPA and CDPHE officials to review the progress of the clean-up.

*Interpretation and Application of the Voluntary Clean-up and Redevelopment Act:* For many reasons, the Town believes the State's Voluntary Clean-up and Redevelopment Act is the best option for the Town, which includes all the stated benefits of VCUPs (C.R.S. §25-16-302(1)(a) "Eliminate impediments to the sale or redevelopment of previously contaminated property;" (b) "Encourage and facilitate prompt clean-up activities;" and (c) "Minimize administrative processes and costs." We understand that the relationship between the federal and state roles with a pending VCUP application is an issue with particular regard to the MOU provisions contemplating forbearance by EPA from enforcement actions once a VCUP application is submitted. Therefore, the following thoughts are provided on this interpretation.

It seems we can all agree that the Rico site meets the definition of an "NPL Caliber" site as defined in the MOU due to "Soils on school, day care center, or residential properties are contaminated by a hazardous substance significantly above background levels and are above concentrations for soil ingestion (residential) listed in the Risk-Based Concentration Table, January 1995," and "Soils on school, day care center, or residential properties are contaminated by lead concentrations significantly above background levels and the lead soil concentration is above 400 ppm," MOU, Attachment A, 2. *Non-CERCLIS sites*. The MOU, III Responsibilities states that once a VCUP application is submitted EPA will not plan and does not anticipate taking any federal action under CERCLA or Superfund unless (1) "the site is an "NPL Caliber" site . . . and exceptional circumstances warrant EPA action." Also, the MOU, III Responsibilities, (4) states ". . . the discovery of significant new information different than that submitted to CDPHE with the VCUP application, renders . . . EPA's assurances [of enforcement action forbearance] void." Considering these two provisions, the Town believes that 'exceptional circumstances' that 'warrant EPA action' do not exist. However, because the first task of Phase I is to conduct a comprehensive assessment of soils throughout Town, Town believes that if such assessment reveals significant new health risk information then the voiding of any EPA's assurances of forbearing enforcement action would be appropriate. While the Town endorses the two phase approach in the VCUP application, we believe it is important for all to recognize that a responsible and comprehensive clean-up program will only come after a comprehensive soils analysis and risk assessment. It would seem that two options exist at this point, (1) recognize that the true complete VCUP plan will come after the comprehensive soils assessment and risk determination and that Phase II is thus subject to further review by both CDPHE and EPA, or (2) treat each phase of the VCUP as an independent VCUP applications.

The Town supports a common understanding and agreement on the interpretation and status of the VCUP application in relation to the MOU, but encourages function to prevail over technicalities or form (i.e. a prompt, cost effective, and responsible voluntary clean-up program that is coordinated with broader community projects is more important to the Rico community than restrictive interpretations of the MOU and Voluntary Clean-up and Redevelopment Act). Furthermore, and more importantly, the MOU certainly does not in any way state that just because exceptions to EPA's forbearance may possibly exist in our situation that EPA is required

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to pursue any level of enforcement action. As a municipality formed under the laws of the State of Colorado, the Town of Rico is tasked with the responsibility to promote the health, safety and general welfare of the Rico community. At this point, Town feels that until the comprehensive soils assessment and risk assessment are performed any decision by EPA to either forbear or pursue any level of enforcement action would be premature. This issue is discussed further below.

**Appropriateness of an Administrative Order on Consent or Other Federal Enforcement Action:**

At the April 30<sup>th</sup> meeting EPA stated its preference to pursue a partial Administrative Order on Consent against ARCO to undertake an enforcement action for the clean-up of residential yards with lead concentrations of and over 3,000 ppm. The Town Board is not supportive of EPA undertaking any enforcement action under any federal authority at this time for reasons which are described below. Most importantly, the Town Board believes (1) the Rico Soils VCUP application is a responsible and comprehensive clean-up plan which should abate any health risks to a reasonable level posed by lead contaminated soils in Rico and (2) that the VCUP process promotes all the stated goals and benefits of the Voluntary Clean-up and Redevelopment Act; and, therefore, (3) that the State's VCUP program is in the best interests of the Rico community. We are all unclear at this point as to the interest or importance of any federal enforcement actions as it directly relates to community health risk abatement in Rico.

**Emergency Health Risk:** In our sense, the concept of "emergency" health risk posed by elevated lead concentrations in soils is confusing. Elevated lead concentrations in soils were known by the Town and EPA since 1995 when ARCO and Rico Renaissance submitted soil sampling data as part of the mine tailings VCUP application for various sites in and around Rico. To date, we have no knowledge of the lead contamination in soils translating into any elevated lead levels in blood. Some 35 people (including many children) had their blood sampled for analysis at the Rico School last week. We will forward the results as soon as we receive them. The Town certainly agrees that any risk posed by lead contaminated soils should be understood and addressed to a reasonable level for the protection of the public health. However, it is difficult for us to character the lead soils contamination as an emergency. Our idea of 'emergency' is a house burning, the water system failing, a car accident, etc., but we understand that our terminology differs from EPA's.

**Significance of the 3,000 ppm Level:** The 3,000 ppm level of lead contamination for residential yards has been discussed as benchmark for immediate clean-up and scope of potential Administrative Order on Consent. While we agree that this level warrants clean-up (as well as less than that level) Town would like to know if there exists formally adopted guidance or past precedence for using the 3,000 ppm level as this benchmark.

**Credibility of the Start 2 Results:** EPA has stated that four properties exceed the 3,000 ppm lead concentration in soils. We have received a letter from one property owner stating that the use of a certain fertilizer may affect the accuracy of sampling results. Also, the results for the property

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on the corner of Soda Street and Highway 145 is suspect because we are aware that the builder brought in some 4 feet of fill around the house, paved the driveway, and placed enough topsoil to grow a lawn. Any flaws in the credibility of the EPA's soil sampling results are likely to result in complications, delays, and extra costs should EPA pursue any enforcement action based on soil sample results to date.

Potentially Responsible Parties: OSWER Directive No. 9834.16 provides guidance on the number of potentially responsible parties in any enforcement order. This guidance expresses concern about the logistical practicalities of issuing orders against too many potentially responsible parties and recommends that success of Orders for remedial action is enhanced where there are relatively few responsible parties. However, this guidance does not suggest that Orders should be targeted for only one PRP. In Rico's case it appears when reviewing the history of mining activity, Rico Argentine Mining Company contributed the most on a volumetric basis towards any lead contamination that currently exists in Rico. We understand that their parent company, Crystal Oil, is still in existence. Also, we are aware that Rico Renaissance owned many properties in Town, including two of the targeted 3,000 ppm residences.

Pursuing any federal enforcement action against ARCO exclusively appears to be not in accordance with EPA's own enforcement action guidelines. Our understanding is that while ARCO was in the chain of title for properties previously owned by Rico Argentine Mining Co., ARCO's activities in Rico were only limited to exploration outside of the Town of Rico which did not contribute to any lead contamination. It does not appear that ARCO was a generator or transporter of any lead in the Rico area. Finally, it is certain ARCO was never in the chain of title for some contaminated properties.

Complexity and Uncertainty of Enforcement Action: Any enforcement action against ARCO will certainly raise many of these complexities. It seems that ARCO is willing to perform a voluntary clean-up project that goes beyond what a strict interpretation of federal authority could legally require; therefore, the Town has very serious reservations and concerns about any enforcement action targeted against ARCO exclusively. The Town believes that if EPA decides it is important to pursue an enforcement action that a complete PRP search should be conducted first, in accordance with 9-22-2002 guidance memo provided by John Peter Suarez, Assistant Administrator. Also, if EPA were to proceed with an enforcement action, the Town certainly would expect to be availed of guidance provisions relating to community involvement, including involving communities in decisions in the same manner as at NPL sites and application for technical assistance grant funding as stated in the 6-24-2002 guidance Memorandum from Barry Breen, Director of the Office of Site Remediation Enforcement.

Overall, we request that EPA seriously consider the magnitude of the many other substantial community issues related to health and welfare, that the Town has a limited ability to assume additional workload, and the community has a limited ability to participate in community issues (ie. When we are meeting on lead contamination issues we are not meeting on waste water, a new water supply to comply with Clean Water Act, and economic development and financing



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which directly relates to Town ability to even provide essential public services). *If pursuing an Administrative Order on Consent or other type of enforcement action is not directly related to health issues and would not somehow enhance the proposed Rico Soils VCUP then the Town strongly discourages creating more issues and work for all involved.*

**Stigma of EPA Enforcement Action:** The EPA has stated that they are not actively pursuing National Priority Listing, Superfund designation, or emergency response actions, but that EPA reserves its right to do so in the future if deemed appropriate. The Town certainly appreciates the current position of EPA and we understand that EPA has been responsive to concerns expressed by the community. We have expressed the concern about the stigma of any EPA enforcement action. It has become apparent that such a stigma is in fact manifesting in Rico and is negatively affecting the ability of property owners to obtain construction financing as well as affecting the marketability of private property.

While EPA representatives have articulated the distinction between Superfund designation, emergency response actions and an Administrative Order on Consent, such distinctions are not commonly understood by the general public, real estate brokers, and lending institutions (especially local lending institutions). Town simply does not have time to educate everyone on what an Administrative Order means compared to Superfund designation. Also, regardless of the type of enforcement action, it all stems from CERCLA authority which is commonly associated with Superfund actions. Purchasing property and obtaining financing for a residence or residential construction is typically the most significant investment a household undertakes. The Town urges EPA to not underestimate the negative impacts of the stigma of an EPA enforcement action on families and individuals. Certainly, abatement of health risks is the number one priority; however, in Rico's situation, if a comprehensive VCUP application will address the health risks, then the negative impacts of an EPA enforcement action are avoidable and unwarranted.

**Blanket AOC for 3,000 ppm Yards:** The Town is very opposed to any type of Administrative Order on Consent or other enforcement action that is structured to encompass all 3,000 ppm yards prior to finalizing a comprehensive soil assessment. The effect of such a blanket enforcement order would be to stigmatize every property that has not yet been sampled. While the timeframe may seem brief, it may not be and it will certainly affect (devastate), the real estate market during the prime summer season. Town requests that you consider this negative effect when considering any enforcement action.

**Relationship between VCUP and AOC:** I was unable to find any EPA guidance on when EPA should consider a voluntary approach versus an enforcement, or partial enforcement, approach towards environmental remediation. I would appreciate providing citations to any such guidance if it exists. Also, it appears that the mixed approach will exacerbate the stigma of EPA enforcement because we were told at the April 21<sup>st</sup> meeting that EPA would not issue comfort letters or 'clean bills of health' for non-EPA enforcement properties. Properties with less than 3,000 ppm appear to be equally included in the stigma of threatened EPA enforcement action. The only action that we can conceive which will alleviate the negative affects of an EPA

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enforcement action is to publicly announce that the lead clean-up will occur under the State's VCUP process and that EPA does not intend to pursue any enforcement action.

**Conclusion:** Again the Town appreciates the involvement of the EPA, not just with the lead contamination issues but also with the broader assistance that EPA is providing to the Town on many environmental issues. The Town Board is very encouraged and grateful for the interest of the EPA in our environmental issues as well as EPA's responsiveness to our community concerns. The progress that has been realized is significant and appreciated. Ironically, the Town, as a municipal local government, has the broadest environmental protection mandate to promote the health of the community and the least technical and financial resources compared with EPA and CDPHE. However, as a remote community, we are the ones actually affected by environmental issues and we are also an essential partner with the EPA and CDPHE efforts to address health issues in the most responsible and comprehensive manner possible. All legalities and politics aside, our Mayor Tom Clark expressed the sentiment of our community the best by saying at the April 30<sup>th</sup> meeting, "If there is a place where everyone should get along, it is in Rico, Colorado." The Town Board believes the Rico Soils VCUP is a responsible and complete approach to address elevated lead health risks in Rico.

Thank you for considering these comments. We look forward to continuing to work with the EPA and CDPHE and appreciate the assistance provided to our community.

Yours truly,



Eric James Heil

Cc: Mark Walker, CDPHE  
Jeff Deckler, CDPHE  
Sheldon Muller, EPA  
Dave McCarthy, ARCO  
Bill Duffy, Davis, Graham and Stubbs  
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